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September 20, 2006

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 700  
Washington, D. C. 20423

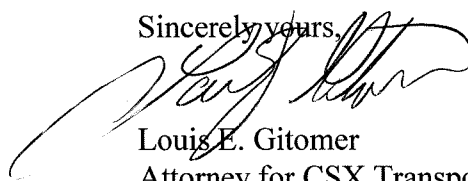
**RE:** Finance Docket No. 34421, *HolRail LLC-Petition for Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line in Orangeburg and Dorchester Counties, South Carolina*  
Finance Docket No. 34421 (Sub-No. 1), *Petition for Crossing Authority Under 49 U.S.C. § 10901(d)*

Dear Secretary Williams:

Enclosed in one document are a Motion and Reply of CSX Transportation, Inc. CSXT is efilng this Motion and Reply. Thank you for your assistance.

If you have any questions, call or email me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Louis E. Gitomer', is written over the typed name and title.

Louis E. Gitomer  
Attorney for CSX Transportation, Inc.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 34421

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HOLRAIL LLC–PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 TO CONSTRUCT  
AND OPERATE A RAIL LINE IN ORANGEBURG AND DORCHESTER COUNTIES,  
SOUTH CAROLINA

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Finance Docket No. 34421 (Sub-No. 1)

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HOLRAIL LLC–PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C. § 10901(d)

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MOTION FOR LEAVE TO REPLY AND  
REPLY OF CSX TRANSPORTATION, INC. TO  
HOLRAIL LLC’s MOTION FOR ORAL ARGUMENT

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Attorneys for: CSX TRANSPORTATION,  
INC.

Dated: September 20, 2006

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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CSX Transportation, Inc. (“CSXT”) moves for leave to reply to the Motion for Oral Argument filed by HolRail LLC (“HolRail”) on August 31, 2006. CSXT opposes the request for oral argument for the reasons set forth below.

**BACKGROUND**

HolRail, a wholly owned subsidiary of Holcim (US) Inc. (“Holcim”), seeks authority from the Surface Transportation Board (the “Board”) to construct a new line of railroad in the right-of-way of CSXT’s active rail property in Orangeburg and Dorchester Counties, SC between approximately CSXT mileposts 394 and 396 (the “Preferred Route”). The CSXT rail line that serves Holcim today traverses about 6,500 feet through the Four Hole Swamp on a narrow right-of-way. To the west of the CSXT line, South Carolina has built State Highway

453, about 20 feet west of the center-line of the rail line. On the east, the CSXT right-of-way extends only 40 feet from the center line of the track.

HolRail, under 49 U.S.C. § 10502 filed a Petition for Exemption from 49 U.S.C. § 10901 on November 13, 2003 (the “Petition”), as Supplemented on December 23, 2003, and as further Supplemented on September 9, 2005, as corrected on September 13, 2005. CSXT filed a reply on February 24, 2006 in opposition to the Petition for Crossing under 49 U.S.C. § 10901(d) filed by HolRail on September 9, 2005. HolRail sought leave to respond and replied to CSXT’s Reply on March 10, 2006. CSXT moved to strike and replied on March 30, 2006. HolRail moved to strike CSXT’s reply, sought leave to reply to the CSXT reply and replied on April 4, 2006. No other pleadings have been filed until HolRail sought oral argument on August 31, 2006.

**CSXT does not oppose the construction of track on Holcim’s property in Orangeburg and Dorchester Counties, SC, also between approximately CSXT mileposts 394 and 396 (the “Alternate Route”). CSXT does not oppose the exemption sought from approval of construction of the Alternate Route, because according to Petitioners, the Alternate Route would not encroach on CSXT’s property.**

During the discovery process, the Board instituted a proceeding to consider the issues raised.<sup>1</sup> On October 13, 2004, the Board announced that on October 20, 2004, it would hold a public meeting to discuss the instant proceeding, among others.<sup>2</sup> The Board held the meeting on October 20, 2004 and among other things, found that it was premature to rule on CSXT’s Motion to Dismiss on the merits.

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<sup>1</sup> *HolRail LLC–Construction and Operation Exemption–in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served February 11, 2004).

<sup>2</sup> *HolRail LLC–Construction and Operation Exemption–in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served October 13, 2004).

At that time, then Commissioner Buttrey read the following statement, with which Vice Chairman Mulvey concurred:

Nevertheless, I feel compelled to express concern about HolRail's proposal. HolRail presents its case as a fairly routine construction case that will likely include a crossing request under 49 U.S.C. 10901(d) at some later stage. Looking behind HolRail's filings, however, it is clear to me that this case is anything but routine. As a practical matter, it appears that the only way HolRail could build its preferred route is by "taking" CSXT's right-of-way for essentially the entire line that it wants to construct. While HolRail may wish to characterize that construction as a crossing, that interpretation appears to be a rather extraordinary concept. HolRail will have a heavy burden to convince me that this is a proper use of the construction and crossing provisions of the statute. Instead, HolRail's proposal appears to be tantamount to a confiscation that is beyond anything contemplated by section 10901.

The Board's served decision contained Commissioner Buttrey's comment.<sup>3</sup>

#### **CSXT SHOULD BE PERMITTED TO REPLY TO HOLRAIL's MOTION**

Typically, a request for oral argument is to be filed with the Board within 20 days of a decision that is being appealed. 49 C.F.R. § 1116.1(c). In the instant proceedings, there is no decision being appealed. The most recent decision in these proceedings was served on January 11, 2006, so that HolRail's filing also is not within the time period provided for in the Board's rules.

CSXT is seeking leave to reply because the rules do not permit replies. 49 C.F.R. § 1116.1(b). As discussed below, the matters in this proceeding are straightforward, especially if (1) the Board properly rejects HolRail's tortured reading of the word "crossing" and HolRail's improperly dismissive view of any legislative history that is contrary to HolRail's position, and

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<sup>3</sup> *HolRail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served October 20, 2004 and corrected October 21, 2004).

(2) having properly interpreted subsection 10901(d), the Board properly dismisses HolRail's crossing request because HolRail is not proposing a crossing as that term is ordinarily used, but rather an expropriation of CSXT's property.

CSXT seeks leave reply in order to explain that the only reason there is any issue before the Board is because of HolRail's reading of 49 U.S.C. § 10901(d). A straightforward reading of subsection 10901(d), as informed by the legislative history leads to the conclusion that CSXT cannot be ordered to make a longitudinal right-of-way available for HolRail's use.

CSXT respectfully requests leave to reply to HolRail's Motion for Oral Argument.

### **REPLY**

This may be "a case of first impression," but not for the reasons cited by HolRail. It is a case of first impression only because of HolRail's strained and misguided interpretation of 49 U.S.C. § 10901(d) and the word "crossing", and HolRail's selective use of the legislative history of 49 U.S.C. § 10901(d). CSXT explained all of this in its March 10, 2006 Reply.

The issue in this proceeding is whether or not the Board will reinterpret subsection 10901(d) to permit the taking of a railroad's right-of-way for the construction of a parallel line along an active rail line. The basic provisions of subsection 10901(d) were enacted as part of the Staggers Act Rail Act of 1980, Pub. L. No. 96-448 (the "Staggers Act") over 25 years ago, and up until this time, no one has attempted to foist on the Interstate Commerce Commission or the Board the interpretation that HolRail seeks.

HolRail has misinterpreted the clear intent and meaning of subsection 10901(d) and not met the substantive or procedural requirements of that subsection. CSXT sees no reason to burden this record by repeating the primary definition of the verb to cross, nor to reiterate the clear legislative history of subsection 10901(d). CSXT has already placed these arguments

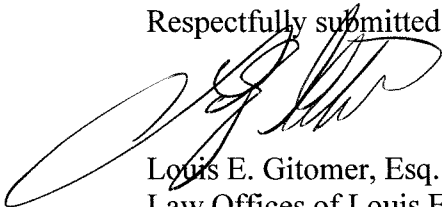
before the Board in its March 10, 2006 Reply at 19-21. Once the proper purpose and meaning of subsection 10901(d) are derived from the plain language of the statute as informed by the generally recognized meaning of the word cross and the crystal clear legislative history, the only issue of first impression is created by HolRail's impermissible interpretation of the statute.

Based on the record developed, it is clear that HolRail has sought to use subsection 10901(d) to construct a longitudinal railroad on CSXT's property and expropriate that property, not to cross CSXT. However, subsection 10901(d) does not confer the power on the Board that HolRail misreads into it. Based on a logical reading of subsection 10901(d), CSXT agrees that if HolRail sought authority from the Board to cross CSXT's track at one point, from one side to the other, the Board would have jurisdiction to order CSXT to permit HolRail to cross CSXT at that point, subject to compliance with the other requirements of subsection 10901(d). But HolRail does not seek to cross CSXT, HolRail seeks to appropriate CSXT's property to its own use. HolRail seeks to expropriate CSXT's property. In the March 10, 2006 Reply, CSXT specifically requested the Board to dismiss HolRail's crossing petition for lack of jurisdiction because of the plain meaning of subsection 10901(d). By concluding that the straightforward reading of subsection 10901(d) suggested by CSXT is correct, the Board can dismiss the crossing petition for the Preferred Route, and there will be no need for the oral argument sought by HolRail.

## CONCLUSION

CSXT respectfully requests the Board to accept this reply to HolRail's Motion for Oral Argument. CSXT further respectfully requests the Board to deny HolRail's request for oral argument as discussed above.

Respectfully submitted,



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Attorneys for: CSX TRANSPORTATION,  
INC.

Dated: September 20, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have caused this Reply to be served by first class mail, postage prepaid on the following parties of record to this proceeding.

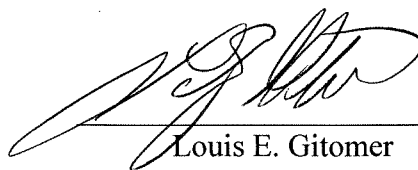
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A handwritten signature in black ink, appearing to read "Louis E. Gitomer", is written over a horizontal line.

Louis E. Gitomer  
September 20, 2006